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 The MITRE Corporation

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

MICHAEL RYAN, an individual

Plaintiff,

vs.

THE MITRE CORPORATION; and  
 DOES 1 through 50, inclusive

Defendants.

Case No. CV 14-03177 CAS (JCGx)

**JOINT STIPULATION RE:  
 DEPOSITION TESTIMONY**

[Declaration of Nick Rosenthal in  
 Support Thereof filed concurrently  
 herewith]

Date: June 25, 2015  
 Time: 10:00 A.M.  
 Place: Courtroom 6A  
 Judge: Hon. Jay C. Gandhi

Removal Filed: April 25, 2014  
 Trial: October 20, 2015

**TO DEFENDANT AND ITS COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on June 25, 2015, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 5 of the United States District Court for the Central District of California, located at 411 West Fourth Street, Santa Ana, California 92701, before the Hon. Jay C. Gandhi, Judge presiding, Plaintiff Michael Ryan ("Plaintiff") will and hereby does move the Court for an Order pursuant to U.S. District Court – Central District Rules 37-1 and 37-2, and Rules 26 and 33 of the Federal Rules of Civil Procedure to compel further deposition testimony.

This Motion was brought after counsel for Plaintiff exchanged a series of written correspondence regarding the discovery items at issue and Defendant's counsel either indicated that the parties could not agree to a resolution of the outstanding discovery issue, or failed to timely provide a position either way on the outstanding discovery issue. Although the Parties attempted to resolve this dispute, they were unable to fully resolve the instant discovery dispute.

This Motion is supported by the Local Rule 37-2 Joint Stipulation and the accompanying declarations and exhibits attached thereto, complete files and records in this action, and upon such oral argument as may be made by counsel during the hearing on this Motion, if any.

Dated: May 29, 2015

DIVERSITY LAW GROUP, P.C.

By: /S/ NICK ROSENTHAL  
 Howard L. Magee  
 Nick Rosenthal  
 Brittany M. Hernandez  
 Attorneys for Plaintiff  
 Michael Ryan

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**JOINT STIPULATION**

Pursuant to Rules 26(b) and 37(a) of the Federal Rules of Civil Procedure and U.S. District Court – Central District Rule (“Local Rule”) 37-2, Plaintiff Michael Ryan (“Plaintiff”) and Defendant The MITRE Corporation (“Defendant” or “MITRE”) hereby submit this Joint Stipulation with respect to Plaintiff’s Motion to Compel further deposition testimony. In accordance with Local Rule 37-1, the parties met and conferred in good faith in both the depositions themselves and through the exchange of written correspondence. Pursuant to Local Rule 37-2, the Parties’ positions about how they propose to resolve the disputes are incorporated in their respective sections.

I.

**PLAINTIFF’S INTRODUCTORY STATEMENT**

Plaintiff Michael Ryan (“Plaintiff”) filed the following claims in his operative complaint: Retaliation; Wrongful Termination in Violation of Public Policy; Age Discrimination; Breach of Oral Contract; and Breach of the Covenant of Good Faith and Fair Dealing. In short, Plaintiff’s theory of liability is that he was wrongfully terminated for engaging in protected activity under California’s Fair Employment and Housing Act (“FEHA”) – for opposing illegal workplace behavior perpetrated against co-worker Ms. Rosemarie Bryant. Declaration of Nick Rosenthal (“Rosenthal Dec.”) ¶ 3.

Plaintiff seeks an order requiring Defendant The MITRE Corporation (“Defendant”) to provide further deposition testimony. Specifically, discovery disputes arose during the depositions of Ms. Kelly McSweeney on February 26, 2015, Mr. Josiah Collens on March 13, 2015, Ms. Veronica Spina on March 20, 2015, and Mr. Gary Gagnon on April 19, 2015. Rosenthal Dec. ¶ 4. Defendant’s counsel improperly objected and instructed each deponent not to answer questions on the grounds that the line of questioning was either not relevant to Plaintiff’s case, or on the grounds of privacy rights. Rosenthal Dec. ¶ 5. It is generally

1 improper for counsel at a deposition to instruct a deponent not to answer a  
 2 question. *Boyd v. University of Maryland Med. System* (D MD 1997) 173 FRD  
 3 143,147—instruction not to answer is “presumptively improper”; *see also, Detoy v.*  
 4 *City and County of San Francisco*, (N.D. Cal. 2000) 196 F.R.D. 362, 367. If  
 5 irrelevant questions are asked, the proper procedure is to answer the questions,  
 6 noting them for resolution at pretrial or trial. *In re Stratosphere Corp. Secur. Litig.*  
 7 (D NV 1998) 182 FRD 614,618-619—party may object to an irrelevant line of  
 8 questions, but instructing a witness not to answer is sanctionable; *see also, Bd. Of*  
 9 *Trs. Of the Leland Stanford Junior Univ. v. Tyco International LTD.*, (C.D. Cal.  
 10 2008) 253 F.R.D. 524, 526.

11 Responses to said questions are integral to Plaintiff’s case in chief because  
 12 they go to Plaintiff’s good faith belief in the validity of the complaints he made  
 13 regarding discriminatory treatment of a co-worker by the name of Ms. Rosemarie  
 14 Bryant. Therefore, Plaintiff respectfully requests the Court grant this Motion to  
 15 Compel further deposition testimony. Rosenthal Dec. ¶ 5.

## 16 II.

### 17 DEFENDANT’S INTRODUCTORY STATEMENT

18 Plaintiff’s employment with MITRE ended on April 22, 2013, as part of a  
 19 company-wide reduction-in-force (“RIF”). On February 24, 2014, Plaintiff filed  
 20 this lawsuit in Los Angeles Superior Court (“Complaint”) alleging the following  
 21 seven causes of action: (1) Discrimination Under the Provisions of the California  
 22 Fair Employment and Housing Act, California Government Code § 12900 et seq.;  
 23 (2) Wrongful Termination in Violation of Public Policy;(3) Age Discrimination;  
 24 (4) Breach of Oral Contract; (5) Breach of the Covenant of Good Faith and Fair  
 25 Dealing; (6) Declaratory Relief; and (7) Retaliation. On April 25, 2014, MITRE  
 26 removed the matter to the United States District Court, Central District of  
 27 California, where it has been set for trial on October 20, 2015.

1 Plaintiff's claim for retaliation is based on his allegedly engaging in  
 2 protected conduct in advocating for Rosemarie Bryant, a subordinate at the MITRE  
 3 El Segundo site, regarding her medical leave accommodations. Unknown to  
 4 MITRE at the time, Plaintiff and Ms. Bryant were engaging in a long-term, sexual  
 5 relationship in violation of MITRE HR policies (which Plaintiff consistently lied to  
 6 MITRE about), and Plaintiff used his authority and position at MITRE's El  
 7 Segundo site improperly to advance Ms. Bryant's cause professionally.

8 As relevant here, Plaintiff deposed MITRE employees Ms. Kelly  
 9 McSweeney on February 26, 2015, Mr. Josiah Collens on March 13, 2015, Ms.  
 10 Veronica Spina on March 20, 2015, and Mr. Gary Gagnon on April 19, 2015.  
 11 During these depositions, Plaintiff's counsel attempted lines of questioning which  
 12 were not relevant to Plaintiff's case, violated third-party privacy rights, which  
 13 MITRE has a duty to protect, and the answers to which would reveal highly  
 14 confidential information and cause harm to MITRE's former and current  
 15 employees. In diversity actions, state law applies; as such, privacy and privilege  
 16 claims are determined under applicable state law. (*See* FRE 501; *Oakes v.*  
 17 *Halvorsen Marine Ltd.* (C.D.C.A. 1998) 179 F.R.D. 281, 284; *Pearce v. Club Med*  
 18 *Sales* (N.D. Cal. 1997) 172 F.R.D. 407, 409.) Further, where state and federal  
 19 claims are joined, but the evidence affects only the state claims, the state law of  
 20 privilege applies. (*Shaklee Corp. v. Gunnell* (N.D. Cal. 1986) 110 F.R.D. 190,  
 21 191.) Defendants removed this case to federal court on the grounds of diversity of  
 22 citizenship and defendants did not amend the complaint they filed in state court.  
 23 Consequently, state privacy and privilege law applies.

24 In civil actions, "the privilege of a witness ... shall be determined in  
 25 accordance with State law." (Fed. R. Evid. § 501; *Samuelson v. Susen* (10th Cir.  
 26 1978) 576 F.2d 547.) The MITRE deponents' rights to personal privacy are  
 27 guaranteed by the California Constitution, Article 1, § 1, which affords individuals  
 28 a qualified privilege for private matters, including information in their personnel

records. (*See Board of Trustees of Leland Stanford Jr. University v. Superior Court* (1981) 119 Cal. App. 3d 516; *see also El Dorado Savings & Loan v. Superior Court* (1987) 190 Cal. App. 3d 342.) This protection applies equally in federal proceedings. (*See Pearce v. Club Med Sales, Inc.* (N.D. Cal. 1997) 172 F.R.D. 407; *Shaklee Corp. v. Gunnell* (N.D. Cal. 1986) 110 F.R.D. 190, 192.) Due to the heightened right of privacy afforded by the California Constitution, Plaintiff seeks unjustifiably to intrude into the deponents' privacy without showing how the deposition testimony would substantiate his claims.

Plaintiff's line of questioning with regard to Ms. Bryant, and other MITRE employees, is of a sensitive and highly confidential nature and would involve the revelation of personal and confidential employee information. MITRE has an affirmative duty to assert the privacy rights of its current and former employees. Plaintiff claims that the lines of questioning at issue in this motion are integral to Plaintiff's case-in-chief; however, this is not the case. Further, MITRE took a balanced approach and allowed any questioning where Plaintiff was actually involved himself in the communications or events at issue. Thus, the Court should deny Plaintiff's motion to compel.

### III.

#### DEPOSITION TESTIMONY AT ISSUE AND DEFENDANT'S RESPONSES

##### THERE TO

#### A. Deposition of Kelly McSweeney

Question 1: Okay. Other than this e-mail exchange, are you aware of any other admonishments Ms. Bryant received from anyone regarding her absences?

Mr. Friedlander: Objection. Privacy. Instruct not to answer.

*McSweeney Tr. (Confidential)* 85:22-25–86:1

Question 2: What were the nature of the questions asked?

Mr. Friedlander: Objection; privacy. Instruct not to answer.

*McSweeney Tr. (Confidential)* 94:21-24



1 Question 3: Did any of these questions relate to Ms. Bryant's alleged  
2 sexual orientation?

3 Mr. Friedlander: Objection; privacy. Instruct not to answer.

4 *McSweeney Tr. (Confidential) 95:2-5*

5 Question 4: Did any of these questions relate to Ms. Bryant's time off  
6 from work?

7 Mr. Friedlander: Objection; privacy. Instruct not to answer.

8 *McSweeney Tr. (Confidential) 95:7-10*

9 B. Deposition of Josiah Collens

10 Question 5: Are you aware of anyone who did look into her past  
11 record of performance to determine that she was  
12 "damaged goods"?

13 Mr. Friedlander: Objection; privacy, except as it relates to  
14 communications with Dr. Ryan.

15 *Collens Tr. 124:19-23*

16 C. Deposition of Veronica Spina

17 Question 6: And what were the nature of the complaints that Rose  
18 Bryant was alleging during that conversation  
19 specifically?

20 Mr. Friedlander: Objection; privacy. Instruct not to answer with any of  
21 these interviews other than your interview with Mike  
22 Ryan.

23 *Spina Tr. 98:4-10*

24 Question 7: Did you ask Rose Bryant whether – strike that. Did you  
25 discuss with any of the other nine individuals, other than  
26 Dr. Ryan, the fact that Dr. Ryan was supportive of Rose  
27 Bryant in her – specifically regarding her complaints  
28 about her treatment within MITRE?

Mr. Friedlander: Objection; privacy. Instruct not to answer, unless you can  
provide some proof that any of the others had anything to  
do with decision-making with respect to Dr. Ryan's  
employment, and I think there's no foundation for that.

*Spina Tr. 119:11-22*

Question 8: Did you come to a conclusion as to whether there was a  
rumor that Ms. Bryant was being called a porn star by her  
coworkers?



Mr. Friedlander: Objection; privacy. Instruct not to answer for the reasons previously mentioned. You can talk about the content of your communications with Dr. Ryan.

*Spina Tr. 143:21-22–144:1*

Question 9: Did you come to any conclusion regarding whether there were rumors that Rose Bryant was a lesbian in the workplace?

Mr. Friedlander: Objection. Privacy. Instruct not to answer on the same grounds. You're welcome to talk about all communications with Dr. Ryan.

*Spina Tr. 144:12-14*

Question 10: Did you ever come to a conclusion as to whether MITRE employees felt that Rose Bryant was milking the system while on FMLA?

Mr. Friedlander: Objection; privacy. Instruct not to answer.

*Spina Tr. 145:1-5*

Question 11: Did you ever come to a conclusion as to whether MITRE employees felt Ms. Bryant was in collusion with her doctor to get time off from work?

Mr. Friedlander: Objection; privacy. Instruct not to answer.

*Spina Tr. 145:9-14*

D. Deposition of Gary Gagnon

Question 12: And I was asking you now, can you articulate for me examples as to wherein Josh Collens' skill set was better than Dr. Ryan's in your opinion as it relates to national security space?

Mr. Magee: I'm not asking for specific ...

Mr. Friedlander: Yes, I agree with that. You can ask about exposure to areas for example, I'm fine with that. Like his knowledge of exposure to areas that Josh might have had versus Dr. Ryan, but in terms of performance assessments, that's private information and I will instruct the witness not to answer with respect to performance assessments of Josh Collens.

*Gagnon Tr. 64:12-15,22-25–65:1-6.*

1 Question 13: Can you give me examples of those AC7's that heard that  
2 message loud and clear which let to production?

3 Mr. Friedlander: Objection to the extent that it calls for private  
4 information with respect to the performance of other  
5 employees.

6 *Gagnon Tr. 99:2-7*

7 Question 14: What other AC7's if any, did this occur with that you can  
8 think of for the fiscal year of 2012?

9 Mr. Friedlander: Objection. Privacy. Instruct not to answer.

10 *Gagnon Tr. 102:9-12*

11 Question 15: One to ten. And did any of those individuals wherein the  
12 ball was dropped so to speak, where they did not sign off  
13 on the P&D, did any of those individuals receive a three?

14 Mr. Friedlander: Objection. Privacy. Instruct not to answer.

15 *Gagnon Tr. 104:5-10*

16 Question 16: Prior to Dr. Ryan's lawsuit, have you ever heard any  
17 allegations regarding Jim Dimarogonas, expressing the  
18 sentiment that Rosemarie Bryant was using FMLA as an  
19 excuse to get out of work and that she might be in  
20 collusion with her doctor?

21 Mr. Friedlander: Objection. Privacy. Instruct not to answer except if Dr.  
22 Ryan was involved and Mr. Gagnon knows of Dr. Ryan's  
23 involvement either through communications with him or  
24 hearing about Dr. Ryan's involvement.

25 *Gagnon Tr. 136:3-12*

26 Question 17: Prior to Dr. Ryan's lawsuit, had you ever heard any  
27 allegations regarding John Woodward expressing the  
28 sentiment that Rosemarie Bryant was using FMLA as an  
excuse to get out of work and that she might be in  
collusion with her doctor?

Mr. Friedlander: Objection. Instruct not to answer. Privacy. Except if such  
information came through Dr. Ryan or had Dr. Ryan's  
involvement.

*Gagnon Tr. 139:10-17*

Question 18: Did you ever hear anyone express frustration over  
Rosemarie Bryant's use of FMLA time?

1 Mr. Friedlander: Same objections. Except as it involves Dr. Ryan. Instruct  
 2 not to answer to that extent.  
 3 *Gagnon Tr.* 140:15-19

4 Question 19: Prior to Dr. Ryan’s lawsuit had you ever heard of an  
 5 allegation that Josh Collens called Rosemarie Bryant  
 6 damaged goods and wished that he had never supported  
 7 her for the Milsatcom, that’s M-I-L-S-A-T-C-O-M,  
 8 position with technical director, John Wilson.

9 Mr. Friedlander: Same objections. If it has anything to do with Dr. Ryan  
 10 you can testify, otherwise instruct not to answer on the  
 11 basis of privacy.  
 12 *Gagnon Tr.* 141:9-18

13 Question 20: Prior to Dr. Ryan’s lawsuit, had you ever become aware  
 14 of any gossip and accusations surrounding Rosemarie  
 15 Bryant?

16 Mr. Friedlander: Same objections. Instruct not to answer except in  
 17 connection with anything having to do with Dr. Ryan.  
 18 *Gagnon Tr.* 141:22-25–142:1-2

#### 19 IV.

#### 20 PLAINTIFF’S CONTENTIONS AND AUTHORITIES

##### 21 A. Counsel for Defendant Improperly Instructed Deponents Not To Answer On 22 Grounds of Privacy

23 “An objection at the time of the examination – whether to evidence, to a  
 24 party’s conduct, ... , to the manner of taking the deposition, or to any other aspect  
 25 of the deposition—must be noted on the record, but the examination still  
 26 proceeds...” *Bd. Of Trs. Of the Leland Stanford Junior Univ. v. Tyco International*  
 27 *LTD.*, (C.D. Cal. 2008) 253 F.R.D. 524, 526. Counsel may only instruct a deponent  
 28 not to answer when “necessary to preserve a privilege, to enforce a limitation  
 ordered by the court, or to present a motion under Rule 30(d)(3).” Fed. R. Civ. P.  
 30(c)(2); see also *Shapiro v. Paul Revere Life Ins. Co.*, 1997 U.S. Dist. LEXIS  
 16286, at \*2 (N.D. Cal. 1997) (Rule 30(c)(2) “provides exclusive grounds for  
 instructing a deponent not to answer”); *Detoy v. City and County of San Francisco*,

1 (N.D. Cal. 2000) 196 F.R.D. 362, 367 (counsel “shall refrain from instructing a  
2 witness not to answer, except as provided in Rule 30 [(c)(2)]”).

3 With respect to the privacy objections, said objections were improper.  
4 Although federal courts do recognize a general right of privacy, it is not absolute  
5 and the nature of the privacy will be weighed against the need for the information  
6 and interest in disclosure. *Rubin v. Regents of Univ. of Cal.*, 114 F.R.D. 1, 2 (N.D.  
7 Cal. 1986). Under both California law and federal law, courts apply a balancing  
8 test to assess whether the need for the information sought outweighs the privacy  
9 right asserted. *Haddad v. Monumental life Ins. Co.*, 2013 U.S. Dist. LEXIS 167705  
10 (N.D. Cal. Nov 22, 2013).

11 Despite clear rules to the contrary, Defense Counsel continuously advised  
12 deponents not to answer, further preventing Plaintiff from obtaining information to  
13 support his case. As a threshold matter, there is a protective order in place for  
14 confidential matters, so any privacy concerns are moot. Additionally, Ms.  
15 Rosemarie Bryant has no reasonable expectation of privacy because she put her  
16 claims in the public record when she filed her case. (*See attached* Exhibit “A” to  
17 the Declaration of Nick Rosenthal). The information sought by the questions goes  
18 directly to Plaintiff’s claims and therefore the relevance outweighs any negligible  
19 privacy interests.

20 B. Deposition Testimony of Kelly McSweeney

21 Regarding question number 1, Plaintiff’s counsel asked whether Ms.  
22 McSweeney was aware of any other admonishments Ms. Bryant had received  
23 regarding her absences. This question goes to Plaintiff’s good faith belief that Ms.  
24 Bryant was being harassed due to the exercise of her FMLA leave rights. Internal  
25 communications pertaining to Ms. Bryant’s absences are relevant and will certainly  
26 lend support to Plaintiff’s claim that he had a good faith belief that Ms. Bryant was  
27 being harassed due to absences resulting from her protected leave. This goes to the  
28 heart of Plaintiff’s retaliation claim which is that he was terminated in response to

1 complaints he made about Defendants discriminatory treatment of Ms. Bryant.

2        Additionally, questions 2 through 4 pertain to an HR investigation that Ms.  
3 McSweeney and Plaintiff participated in. MITRE's HR investigation into Ms.  
4 Bryant's treatment is directly relevant to Plaintiff's claims that he was retaliated  
5 against because he complained of what he perceived to be illegal treatment  
6 directed at Ms. Bryant. The interview questions being asked could reveal that  
7 MITRE had knowledge of harassment or discrimination to which Ms. Bryant had  
8 been subjected. Additionally, the content of the investigation could demonstrate  
9 that Plaintiff's complaints were substantiated thereby establishing his "good faith  
10 belief" in them.

11 C. Deposition Testimony of Josiah Collens

12        Regarding question number 5, Mr. Collens was asked if anyone had looked  
13 into Ms. Bryant's past record of performance to determine that she was "damaged  
14 goods" because of the FMLA leave she took. It is Plaintiff's theory of retaliation  
15 that he was subjected to adverse action in response to advocating on behalf of Ms.  
16 Bryant because he believed she was being discriminated against based on  
17 comments like her being "damaged goods." Thus, this question goes directly to  
18 Plaintiff's good faith belief that Ms. Bryant was being subjected to illegal  
19 discrimination and harassment.

20 D. Deposition Testimony of Veronica Spina

21        In questions 6 and 7, Ms. Spina was asked for further details pertaining to  
22 the HR investigation—particularly, the nature of the complaints. These questions  
23 go to the issue of Plaintiff's good faith belief that Ms. Bryant was being harassed  
24 and/or discriminated against due to her perceived sexual orientation and exercise of  
25 FMLA rights. The content of the investigation is critical to Plaintiff's case.  
26 Obviously, if there were rumors floating around MITRE regarding Ms. Bryant's  
27 sexual orientation or veracity with respect to the exercise of FMLA rights, it would  
28 validate Plaintiff's good faith belief that Ms. Bryant was being subjected to illegal

1 workplace conduct.

2 Finally, regarding questions 8 through 11, the questions asked whether Ms.  
3 Spina discussed Plaintiff's support of Ms. Bryant with each individual interviewed  
4 as part of the HR investigation and whether Ms. Spina came to any conclusions  
5 resulting from the HR investigation.<sup>1</sup> Ms. Spina's investigation into Ms. Bryant's  
6 treatment is directly relevant to Plaintiff's claims. The interview questions being  
7 asked and discussions therein could reveal that MITRE had knowledge of  
8 harassment or discrimination to which Ms. Bryant had been subjected. Further, any  
9 privacy concerns are outweighed by the relevance to Dr. Ryan's case; the  
10 relevance here being Dr. Ryan's good faith belief in the validity of Ms. Bryant's  
11 complaints that she was being harassed and/or discriminated against due to her  
12 FMLA leave and perceived sexual orientation. Therefore, knowing details about  
13 what other people's perceptions or opinions were regarding Dr. Ryan's advocacy  
14 on behalf of Ms. Bryant is crucial to this case.

15 E. Deposition Testimony of Gary Gagnon

16 Regarding question 12, Mr. Gagnon was asked, in his opinion, to articulate  
17 examples as to whether Josh Collens' skill set was better than Plaintiff's as it  
18 relates to national security space. Both Plaintiff and Mr. Collens played a role in  
19 national security space functions. This question goes directly to Plaintiff's age  
20 discrimination claim. Defendant needs to be able to justify why a younger person  
21 took the job of an older person and to do so, an analysis of each of these  
22 individuals' qualifications is necessary.

23 Also, Mr. Gagnon was asked questions 13 through 15 that related to AC-7's  
24 and performance reviews. Mr. Gagnon had testified that he and Ray Haller  
25 evaluated Plaintiff's performance relative to other AC-7's performances. As such,  
26 these questions are relevant to the legitimacy of Plaintiff's "3" rating which

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27 <sup>1</sup> Specifically, Ms. Spina was asked if she came to any conclusions as to whether rumors  
28 regarding Ms. Bryant's sexual orientation, being a porn star, milking the system while on FMLA,  
and being in collusion with her doctor, were unfounded.

1 Defendant maintains is the basis for Plaintiff's termination. Privacy interests are  
 2 outweighed when considering Plaintiff's need to obtain this information. It is  
 3 relevant to Plaintiff's case whether or not any other employee whose P&D were  
 4 not signed received a "3" ranking. It is Plaintiff's position that he was singled out  
 5 for various illegal reasons and that this is reflected in Defendant's failure to adhere  
 6 to proper process. As such, it is vital to establish why the P&D process was not  
 7 adhered to and absolutely necessary to determine if the "ball was dropped" for any  
 8 other AC-7 during Plaintiff's last year of employment with Defendant.

9 Finally, Mr. Gagnon was asked questions 16 through 20 relating to Ms.  
 10 Bryant's treatment by Defendant. These questions go to Dr. Ryan's good faith  
 11 belief that Ms. Bryant was being harassed or discriminated against due to her  
 12 FMLA leave and perceived sexual orientation. If Mr. Gagnon heard any improper  
 13 comments or rumors regarding Ms. Bryant, regardless if it was from Plaintiff or  
 14 anyone else, to the extent it was on Mr. Gagnon's radar, it would operate to  
 15 validate Plaintiff's good faith belief that Ms. Bryant was being harassed and/or  
 16 discriminated against.

17  
 18 V.

## 19 DEFENDANT'S CONTENTIONS AND AUTHORITIES

### 20 A. General Contentions Regarding Defendant's Proper Objections

21 In connection with this matter, Plaintiff deposed MITRE employees Ms.  
 22 Kelly McSweeney on February 26, 2015, Mr. Josiah Collens on March 13, 2015,  
 23 Ms. Veronica Spina on March 20, 2015, and Mr. Gary Gagnon on April 19, 2015.  
 24 During these depositions, Plaintiff's counsel attempted lines of questioning which  
 25 were not relevant to Plaintiff's case, violated third-party privacy rights, which  
 26 MITRE has a duty to protect, and the answers to which would reveal highly  
 27 confidential information and cause harm to MITRE's former and current  
 28 employees. In diversity actions, state law applies; as such, privacy and privilege



1 claims are determined under applicable state law. (*See* FRE 501; *Oakes v.*  
 2 *Halvorsen Marine Ltd.* (C.D.C.A. 1998) 179 F.R.D. 281, 284; *Pearce v. Club Med*  
 3 *Sales* (N.D. Cal. 1997) 172 F.R.D. 407, 409.) Further, where state and federal  
 4 claims are joined, but the evidence affects only the state claims, the state law of  
 5 privilege applies. (*Shaklee Corp. v. Gunnell* (N.D. Cal. 1986) 110 F.R.D. 190,  
 6 191.) Defendants removed this case to federal court on the grounds of diversity of  
 7 citizenship and defendants did not amend the complaint they filed in state court.  
 8 Consequently, state privacy and privilege law applies.

9 In civil actions, “the privilege of a witness ... shall be determined in  
 10 accordance with State law.” (Fed. R. Evid. § 501; *Samuelson v. Susen* (10th Cir.  
 11 1978) 576 F.2d 547.) The MITRE deponents’ rights to personal privacy are  
 12 guaranteed by the California Constitution, Article 1, § 1, which affords individuals  
 13 a qualified privilege for private matters, including information in their personnel  
 14 records. (*See Board of Trustees of Leland Stanford Jr. University v. Superior*  
 15 *Court* (1981) 119 Cal. App. 3d 516; *see also El Dorado Savings & Loan v.*  
 16 *Superior Court* (1987) 190 Cal. App. 3d 342.) This protection applies equally in  
 17 federal proceedings. (*See Pearce v. Club Med Sales, Inc.* (N.D. Cal. 1997) 172  
 18 F.R.D. 407; *Shaklee Corp. v. Gunnell* (N.D. Cal. 1986) 110 F.R.D. 190, 192.) Due  
 19 to the heightened right of privacy afforded by the California Constitution, Plaintiff  
 20 seeks unjustifiably to intrude into the deponents’ privacy without showing how the  
 21 deposition testimony would substantiate his good-faith claim.  
 22

23 The right to privacy is codified in California as set forth in Article I, Section  
 24 1 of the California Constitution: “All people are by nature free and independent  
 25 and have inalienable rights. Among these are enjoying and defending life and  
 26 liberty, acquiring, possessing and protecting property, and pursuing and obtaining  
 27 safety, happiness, and privacy.” Discovery orders are “state-compelled disclosure”  
 28 and therefore the privacy rights protected by the California Constitution are equally

1 applied to purely private litigation. (*Britt v. Superior Court of San Diego County*  
 2 (1978) 20 Cal. 3d 844, 856, fn.3 (right of privacy may be invoked by a litigant as  
 3 justification for a refusal to answer questions which unreasonably intrude on that  
 4 right); *see also Vinson v. Superior Court (Peralta Community College Dist.)*  
 5 (1987) 43 Cal. 3d 833.) Even when discovery of private information is found  
 6 directly relevant to the issues of ongoing litigation, it will not be automatically  
 7 allowed, there must then be a “careful balancing” of the “compelling public need”  
 8 for discovery against the “fundamental right of privacy.” (*Board of Trustees of*  
 9 *Leland Stanford Jr. University v. Superior Court of Santa Clara County* (1981)  
 10 119 Cal. App. 3d 516, 525.)

11 California courts have extended the right to privacy to encompass a privilege  
 12 justifying a litigant’s refusal to answer deposition questions unreasonably intruding  
 13 on this right. (*Condit v. Dunne* (S.D.N.Y. 2004) 225 F.R.D. 100, 108.) When this  
 14 privilege conflicts with the need for truthful discovery, California courts apply a  
 15 balancing test to determine whether the public interest in discovery outweighs the  
 16 private interest in the privilege. (*See Hill v. Nat’l Collegiate Athletic Assn.* (1994)  
 17 7 Cal. 4th 1 (“Even at the risk of losing some degree of flexibility in decision  
 18 making, a constitutional standard that carefully weighs the pertinent interests at  
 19 stake in an ordered fashion is preferable to one dominated by the vague and  
 20 ambiguous adjective ‘compelling.’”) The state standard thus requires that the party  
 21 seeking discovery of information within the “zone of privacy” must show that the  
 22 information is *essential* to determining the truth of the disputed matters and is not  
 23 available from other sources or through less intrusive means. There is an *even*  
 24 *higher burden* where a *third party’s* privacy rights are affected. A plaintiff’s need  
 25 for information “will not easily override a third party’s privacy rights.” (*Olympic*  
 26 *Club v. Sup.Ct. (City & County of San Francisco)* (1991) 229 Cal. App. 3d 358,  
 27 363.)  
 28

1 Plaintiff has not shown that the information sought is essential to  
 2 determining the truth of the disputed matters, and it is not. In fact, Plaintiff did not  
 3 even respond to Defendants' response, sent on April 9, 2015, to his meet and  
 4 confer letter and now moves to compel further testimony. Plaintiff's line of  
 5 questioning with regard to Ms. Bryant, and other MITRE employees, is of a  
 6 sensitive and highly confidential nature and would involve the revelation of  
 7 personal and confidential employee information. MITRE has an affirmative duty  
 8 to assert the privacy rights of its current and former employees. Plaintiff claims  
 9 that the lines of questioning at issue in this motion are integral to Plaintiff's case-  
 10 in-chief, however, these questions would not provide information essential to  
 11 determining the truth of the disputed matters.

12 Before setting forth MITRE's specific contentions with regard to the  
 13 deposition testimony at issue, MITRE maintains the following positions:

- 14 • Ms. Bryant has a right of privacy and MITRE does not have the right to  
 15 waive that right of privacy.
- 16 • MITRE asked Plaintiff to get a written waiver from Ms. Bryant with respect  
 17 to her privacy rights and Plaintiff did not do so.
- 18 • Plaintiff had the right to depose Ms. Bryant so she could waive (or not  
 19 waive) her privacy rights and Plaintiff did not do so.
- 20 • One of Plaintiff's legal claims is that his employment was terminated in  
 21 retaliation for raised issues with respect to Ms. Bryant's employment. In  
 22 balancing Ms. Bryant's right to privacy against Plaintiff's right to obtain  
 23 discovery on his legal claim of retaliation, MITRE allowed discovery  
 24 (written and in deposition) *on any issues where Plaintiff was involved*. For  
 25 example, MITRE produced Plaintiff's statement to Ms. Spina in her  
 26 investigation and allowed Plaintiff to ask any questions he wanted to ask  
 27 about Ms. Spina's interview with Plaintiff. Likewise, throughout the  
 28

deposition process MITRE has allowed Plaintiff to ask anything where Plaintiff was involved. By definition, *Plaintiff is asking for information about Ms. Bryant where Plaintiff was not involved.*

- Plaintiff has taken the position that Ms. Bryant's privacy rights are protected by the protective order in this case. However, Ms. Bryant has never taken that position and it is basic that she continues to have privacy rights irrespective of the existence of a protective order in this case. Indeed, Plaintiff decided not to directly involve Ms. Bryant in this matter (either through deposing her or asking her to waive her privacy right, both of which were suggested by MITRE's counsel) because she does not want her private information in the hands of Plaintiff or his counsel, let alone the subject of the public court record in this case. Note Plaintiff's inconsistent argument in this case, which has a protective order, that Plaintiff is entitled to insist upon his own right of privacy despite the existence of the protective order.
- Plaintiff has argued that Ms. Bryant waived her privacy right in this matter by filing *her* litigation. MITRE disagrees and, in any event, it is not MITRE's obligation or right to provide Ms. Bryant's private information. Rather, that is a decision to be made by Ms. Bryant. Note also Plaintiff's inconsistent argument in discovery in this case that he retains a privacy right although he filed this lawsuit and there is a protective order in this matter.
- Plaintiff has argued that Ms. Bryant's private information that Plaintiff does not know about goes to Plaintiff's good faith belief. If Plaintiff does not know about the information then, by definition, it does not go to his good faith belief.

MITRE believes that it has taken the proper approach that both balances Ms. Bryant's privacy rights and gives Plaintiff the information he needs with respect to his retaliation claims.

1 B. Deposition of Kelly McSweeney

2 With regard to Question 1, Plaintiff claims it goes toward the issue of Dr.  
 3 Ryan's good faith belief that Ms. Bryant was being harassed due to her FMLA  
 4 leave. However, this line of questioning has no bearing on *Dr. Ryan's* beliefs nor  
 5 is it reasonably calculated to lead to admissible evidence of Dr. Ryan's beliefs. It  
 6 cannot be established from this line of questioning that *Ms. McSweeney's*  
 7 knowledge of Ms. Bryant's absences would have any bearing on Dr. Ryan's  
 8 knowledge or relevance in this matter. Plaintiff also claims this question lends  
 9 support to the claim that Plaintiff had a good faith belief that Ms. Bryant was being  
 10 harassed. Again, the line of questioning with regard to Ms. McSweeney's  
 11 knowledge has no bearing on Plaintiff's claims. Plaintiff further claims this goes  
 12 to the heart of his retaliation claim, however, there is no indication that Plaintiff, or  
 13 his supervisors, or anyone in his chain of command with authority over Plaintiff,  
 14 were aware of these communications. In deposition, Plaintiff was allowed to ask  
 15 anything concerning Ms. Bryant to the extent Plaintiff was involved (which goes to  
 16 the issue of his subjective good faith).  
 17

18 With regard to Questions 2 through 4, Plaintiff claims it might reveal  
 19 whether MITRE had knowledge of harassment or discrimination, which Ms.  
 20 Bryant claims to have been subjected. However, again, this line of questioning has  
 21 no bearing on Plaintiff's case and is not reasonably calculated to lead to admissible  
 22 evidence. (Please see response in preceding paragraph.) The investigation in  
 23 connection with Ms. Bryant was attorney-client privileged and unrelated to  
 24 Plaintiff's claims. In addition, as seen in Ms. Spina's deposition, Plaintiff was  
 25 fully allowed to ask about Plaintiff's involvement in the investigation. Further,  
 26 Plaintiff's statement to Ms. Spina from the investigation was produced in  
 27 discovery. Asking Ms. McSweeney these questions borders on harassing and is  
 28 clearly not related to Plaintiff's case.

1 C. Deposition of Josiah Collens

2 With regard to Question 5, Plaintiff claims it goes toward the issue of Dr.  
 3 Ryan's good faith belief that Ms. Bryant was allegedly being subjected to illegal  
 4 discrimination and harassment. However, this line of questioning has no bearing  
 5 on Dr. Ryan's beliefs nor is it reasonably calculated to lead to admissible evidence  
 6 of Dr. Ryan's beliefs. It cannot be established from this line of questioning that  
 7 Mr. Collens' knowledge of anyone looking into Ms. Bryant's past record of  
 8 performance would have any relevance in this matter, let alone any bearing on Dr.  
 9 Ryan's good faith belief.

10 D. Deposition of Veronica Spina

11 With regard to Questions 6 and 7, Plaintiff claims it goes to the issue of Dr.  
 12 Ryan's good faith belief that Ms. Bryant was allegedly being harassed due to her  
 13 perceived sexual orientation and exercise of FMLA rights. However, this line of  
 14 questioning has no bearing on Dr. Ryan's beliefs nor is it reasonably calculated to  
 15 lead to admissible evidence of Dr. Ryan's beliefs. It cannot be established from  
 16 this line of questioning that Ms. Spina's knowledge or recollection of alleged  
 17 perceived harassment of Ms. Bryant or Ms. Bryant's complaints would have any  
 18 relevance in this matter, let alone any bearing on Dr. Ryan's good faith belief.

19 Plaintiff claims that the information sought would somehow validate Dr.  
 20 Ryan's good faith belief that Ms. Bryant was being subjected to illegal workplace  
 21 conduct. This argument is flawed and misplaced. To argue that Dr. Ryan has a  
 22 good faith belief in Ms. Bryant's alleged illegal treatment because a *third-party*  
 23 allegedly has knowledge of such allegations and/or complaints is conclusory and  
 24 without basis. The only thing relevant to Dr. Ryan's good faith belief argument is  
 25 *Dr. Ryan's* knowledge and involvement, not that of those around him. The  
 26 investigation in connection with Ms. Bryant was attorney- client privileged and  
 27 unrelated to Plaintiff's claims. In addition, as seen in Ms. Spina's deposition,  
 28



1 Plaintiff was fully allowed to ask about Plaintiff's involvement in the investigation.  
2 Further, Plaintiff's statement to Ms. Spina was produced in discovery. Plaintiff  
3 was allowed to ask anything concerning Ms. Bryant to the extent Plaintiff was  
4 involved (which goes to the issue of his subjective good faith), however, the line of  
5 questioning Plaintiff pursued could not be answered without revealing highly  
6 confidential private information, the revelation of which is harmful to a third party.

7 With regard to Questions 8 through 11, Plaintiff pursued an offensive line of  
8 questioning tantamount to a fishing expedition regarding alleged rumors about Ms.  
9 Bryant, including her sexual orientation, rumors of being a porn star, milking the  
10 system while on FMLA, and being in collusion with her doctor. Plaintiff claims  
11 these questions might reveal whether MITRE had knowledge of harassment or  
12 discrimination, which Ms. Bryant claims to have been subjected. However, again,  
13 this line of questioning has no bearing on Plaintiff's case or knowledge and is not  
14 reasonably calculated to lead to admissible evidence. The investigation in  
15 connection with Ms. Bryant was attorney-client privileged and unrelated to  
16 Plaintiff's claims. In addition, Plaintiff was fully allowed to ask about Plaintiff's  
17 involvement in the investigation during the deposition. Further, Ms. Spina's notes  
18 from Plaintiff's interview was produced in discovery. MITRE also took the  
19 position that if Plaintiff could demonstrate that any of the persons involved in Ms.  
20 Spina's investigation were decision-makers with respect to Plaintiff's employment,  
21 MITRE would allow Ms. Spina to testify as to anything said about Plaintiff in her  
22 interviews with such other persons. However, no one interviewed by Ms. Spina  
23 was a decision-maker with respect to Plaintiff's employment. Indeed, as Mr.  
24 Gagnon's deposition made clear, he and Mr. Haller were the decision-makers with  
25 respect to Plaintiff's employment and were the ones that gave Plaintiff a  
26 performance rating of "3" in his review immediately prior to the April RIF.  
27  
28



1 Further, Plaintiff had the right to and did ask Mr. Gagnon questions about his  
2 knowledge of any activity by Plaintiff on behalf of Ms. Bryant.

3 E. Deposition of Gary Gagnon

4 With regard to Question 12, Plaintiff claims that it goes directly to Plaintiff's  
5 age discrimination claim because a younger person took the job of an older person.  
6 Mr. Collens has his own right of privacy, which he clearly has not waived, and that  
7 right protects any questions about the details of Mr. Collens' performance  
8 assessment. Here, Mr. Collens' privacy right must be balanced with Plaintiff's  
9 claim, MITRE allowed Mr. Collens to testify as to his age and whether or not he  
10 received a "3" in the performance review period prior to the April RIF. Plaintiff's  
11 employment was terminated as part of the April RIF (along with approximately  
12 100 others) due to his "3" rating. Further, Mr. Gagnon fully explained in his  
13 deposition why Plaintiff received a "3" in his performance rating, also making  
14 clear that the rating was given prior to the time it was decided by MITRE a RIF  
15 would occur and prior to the determination of the April RIF criteria. Any further  
16 response to this line of questioning would require highly confidential, third-party  
17 information to be revealed, the revelation of which would cause harm.

18 With regard to Questions 13 through 15, Plaintiff claims that it is relevant to  
19 the legitimacy of Dr. Ryan's "3" rating, and that the privacy interests of others are  
20 outweighed by Plaintiff's need for this information. Plaintiff's employment was  
21 terminated as part of the April RIF (along with approximately 100 others) due to  
22 his "3" rating. Further, Mr. Gagnon fully explained in his deposition why Plaintiff  
23 received a "3" in his performance rating, also making clear that the rating was  
24 given prior to the time it was decided a RIF would occur and prior to the  
25 determination of the April RIF criteria. In balancing these employees' privacy  
26 rights against the need for information in this litigation, their privacy rights would  
27 trump. As stated above, state law applies in diversity actions; as such, privacy  
28 claims are determined under applicable state law and Plaintiff has not

1 demonstrated that the information sought is essential to determining the truth of the  
2 disputed matters with respect to his case.

3 With regard to Questions 16 through 20, again, the line of questioning with  
4 regard to rumors regarding Ms. Bryant has no bearing on Plaintiff's claims.  
5 Plaintiff claims these questions go to his good faith belief that Ms. Bryant was  
6 being harassed or discriminated against due to illegal reasons, however, there is no  
7 indication that Plaintiff, or his supervisors, or anyone in his chain of command  
8 with authority over Plaintiff, were aware of these rumors and/or alleged  
9 communications. As indicated in the deposition, Plaintiff was allowed to ask  
10 anything he wanted concerning Ms. Bryant to the extent Plaintiff was involved  
11 (which goes to the issue of his subjective good faith), which he did.

12 Plaintiff further claims that the information sought would somehow validate  
13 Dr. Ryan's good faith belief that Ms. Bryant was being subjected to illegal  
14 workplace conduct. This argument is flawed and misplaced. To argue that Dr.  
15 Ryan had a good faith belief in Ms. Bryant's alleged illegal treatment because a  
16 *third-party* allegedly had knowledge of such allegations and/or complaints is  
17 conclusory and without basis. The only thing relevant to Dr. Ryan's good faith  
18 belief argument is *Dr. Ryan's* knowledge and involvement, not that of those  
19 around him.

20 F. Conclusion

21 The right to privacy stems from the California Constitution and a litigant's  
22 right to conduct discovery to pursue his claim will not easily override such an  
23 interest. To date, Plaintiff has not shown that the information sought is essential to  
24 determining the truth of the disputed matters and Plaintiff's motion to compel must  
25 this be denied.

26 ///

27 ///

28 ///

1 Dated: May 29, 2015

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